# United States Department of Labor
# Employees' Compensation Appeals Board

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| **C.L., Appellant** | ) | |
| **and** | ) | **Docket No. 20-1631** |
| | ) | **Issued: December 8, 2021** |
| **DEPARTMENT OF VETERANS AFFAIRS, WAINWRIGHT MEMORIAL MEDICAL CENTER, Walla Walla, WA, Employer** | ) | |

*Appearances:*
*Alan J. Shapiro, Esq.*, for the appellant[1]
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

### *JURISDICTION*

On September 16, 2020 appellant, through counsel, filed a timely appeal from an August 5, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.[3]

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id*. An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id*.; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq*.

[3] The Board notes that, following the August 5, 2020 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id*.

## ***ISSUE***

The issue is whether appellant has met her burden of proof to establish a recurrence of disability for the period May 2 through October 25, 2019, causally related to her accepted April 20, 2016 employment injury.

## ***FACTUAL HISTORY***

On April 21, 2016 appellant, then a 60-year-old registered nurse, filed a traumatic injury claim (Form CA-1) alleging that on April 20, 2016 she sustained a lower back injury and strained her left lower extremity when she twisted her torso when a travel van door became stuck as she was sliding it closed while in the performance of duty. On June 7, 2016 OWCP accepted the claim for strain of muscle, fascia, and tendon of lower back, and other unspecified complications of medical care. On September 8, 2017 it expanded its acceptance of the claim to include lumbar radiculopathy. OWCP paid appellant wage-loss compensation on the supplemental rolls for work absences related to the accepted injury.

On January 2, 2018 Dr. Jason Dreyer, an osteopathic physician Board-certified in neurosurgery, performed OWCP-authorized anterior interbody arthrodesis and fusion at T12-L1, L1-2, L2-3, and L3-4, posterolateral arthrodesis at T12-L1, L1-2, L3-4, and L4-5, laminectomies at L1 through L5, and posterior spinal instrumentation from T12 through L5. OWCP paid appellant wage-loss compensation on the supplemental and periodic rolls during her recuperation.

In reports dated May 3, 2018, Dr. Michael Wilcox, a Board-certified internist, prescribed physical therapy to treat appellant's sacroiliac pain. He released appellant to light-duty work for four hours a day. Dr. Wilcox restricted lifting to 20 pounds, limited sitting and standing, proscribed bending, twisting, and crouching, and directed that appellant be allowed to change position every 45 minutes.

On May 7, 2018 appellant returned to work for four hours a day as a modified-duty nurse. The position required home visits and clerical duties. Appellant would be able to change position every 45 minutes, and would carry a nurse's bag within the 20-pound lifting restriction. OWCP paid her wage-loss compensation for the remaining four hours a day.

On July 11, 2018 Dr. Sarah Hammil, a Board-certified obstetrician and gynecologist, implanted an Interstim sacral stimulator unit to address refractory overactive bladder.

In a July 16, 2018 report, Dr. Wilcox continued appellant on light duty for four hours a day. He noted that a series of sacroiliac injections[4] and physical therapy treatments had reduced appellant's lumbar symptoms. Dr. Wilcox decreased her lifting limitation to five pounds due to the July 11, 2018 surgical procedure, and renewed the remainder of the May 3, 2018 work limitations.

In an August 16, 2018 report, Dr. Wilcox noted that appellant had undergone the second stage of the sacral stimulator procedure three weeks previously and had obtained excellent results with urinary and fecal incontinence. She reported persistent numbness of the left lower extremity with occasional paresthesias. Dr. Wilcox opined that appellant was ready to increase her work

[4] Appellant underwent an OWCP-authorized right sacroiliac joint injection on July 9, 2018.

status from 4 to 6 hours a day, with a 20-pound lifting limitation, avoidance of bending, twisting, and crouching, and the ability to reposition every 45 minutes. In a duty status report (Form CA-17) of even date, he increased appellant's work schedule to six hours a day, with lifting limited to 20 pounds, and no climbing, kneeling, bending, stooping, or twisting. Dr. Wilcox noted that appellant would need to change position every 45 minutes.

On September 4, 2018 appellant began working light-duty work for six hours a day. OWCP paid her wage-loss compensation for the remaining two hours a day.

In reports dated from September 27 through December 27, 2018, Dr. Wilcox found appellant able to continue working six hours a day within the August 16, 2018 work limitations.

In a December 12, 2018 report, Dr. Stephen C. Houston, a Board-certified neurosurgeon, noted that sacroiliac joint injections had relieved appellant's symptoms, and that postoperative imaging did not reveal any complications.

In a January 10, 2019 report, Dr. John-David Black, a Board-certified orthopedic surgeon, noted appellant's history of "multiple lumbar and cervical spinal fusions," the most recent procedure in January 2018. Appellant described increasing sacroiliac joint and buttock pain, with paresthesias in the lateral thighs, left greater than right. Dr. Black noted that appellant was not able to work more than six hours due to sacroiliac joint pain and could not sit more than 45 minutes or walk further than 100 yards due to buttock pain. He diagnosed bilateral sacroiliac joint dysfunction. Dr. Black recommended a sacroiliac joint fusion as injections and conservative care had failed to relieve her symptoms.[5]

In reports dated from January 28 through March 27, 2019, Dr. Wilcox found appellant able to continue working for six hours a day within the prior restrictions of a 20-pound weight limit, avoidance of bending, twisting, and crouching, and changing position every 45 minutes. In a March 27, 2019 report, he noted that she continued to experience significant sacroiliac pain despite her six-hour work schedule, work restrictions, and an ergonomic desk. Appellant had difficulty with prolonged sitting and standing. Dr. Wilcox indicated that it was "possible that she will not be able to sustain her current work duties without the recommended sacroiliac procedure." He opined that appellant could continue to work six hours a day within her prior physical limitations.

On May 16, 2019 appellant filed a claim for compensation (Form CA-7) for intermittent disability for the period April 29 through May 10, 2019. An accompanying May 17, 2019 time analysis form (Form CA-7a) indicates that appellant claimed two hours per day of leave without pay (LWOP) from April 29 through May 1, 2019, and four hours LWOP from May 2 through 10, 2019.

In a May 24, 2019 letter, OWCP notified appellant that it had authorized payment for two hours a day in wage-loss compensation from April 29 through May 10, 2019. It found, however, that the medical evidence of record did not support a worsening of her condition effective May 2, 2019 such that she could no longer work for six hours a day. OWCP afforded appellant 30 days to submit additional evidence in support of her claim for increased disability.

[5] In a February 13, 2019 report, Dr. Black opined that the April 20, 2016 employment injury caused sacroiliitis requiring surgical joint fusion.

Appellant subsequently submitted a May 24, 2019 Form CA-7 claiming four hours a day of wage-loss compensation for the period May 13 through 24, 2019.

In a letter dated May 28, 2019, OWCP notified appellant that the medical evidence of record was insufficient to support her claim for two hours per day of additional wage-loss compensation commencing May 13, 2019. It afforded her 30 days to submit additional evidence in support of her claim for increased disability.

In response, appellant submitted a May 1, 2019 report from Dr. Wilcox. Dr. Wilcox related appellant's "increasing difficulty managing a six[-]hour workday" due to postoperative sacroiliac pain that made prolonged sitting and standing difficult. He diagnosed sacroiliac pain and a lumbar disc herniation. Dr. Wilcox found that appellant's current duties were not sustainable and reduced her work schedule from six to four hours a day. He renewed prior restrictions of no lifting more than 20 pounds; no bending, twisting, or crouching; and repositioning every 45 minutes.

In a report dated July 1, 2019, Dr. Wilcox reiterated that he had reduced appellant's work status from six to four hours a day due to worsened sacroiliac pain. He noted that even with a reduced schedule, appellant's functioning was very limited at the end of a workday and that she continued to have significant difficulty with prolonged sitting and standing. Dr. Wilcox commented that, if appellant did not undergo sacroiliac joint fusion, she would need to pursue medical disability.

On July 25, 2019 OWCP referred appellant, the medical record, a statement of accepted facts (SOAF), and a list of questions to Dr. Steven Nadler, a Board-certified orthopedic surgeon, to obtain a rationalized second opinion report to determine whether the sacroiliitis diagnosed by Dr. Black was caused or aggravated by the April 20, 2016 employment injury, and whether the sacroiliac arthrodesis recommended by Dr. Black and Dr. Wilcox was necessary to treat the accepted employment injury. In an August 21, 2019 report, Dr. Nadler reviewed the medical record and SOAF, noting a November 28, 2012 L4-5 lumbar fusion, a previous fusion at an unknown level and date, and the authorized January 2, 2018 multilevel fusion. On examination, he observed tenderness to palpation in the lumbosacral midline extending to both iliac crests and the sacral/mid-sacroiliac joints. Dr. Nadler found limited range of lumbar motion in all planes, diminished sensation in the outer aspect of the left lower extremity and thigh, and the dorsum and medial side of the left foot. He diagnosed status post April 20, 2016 occupational lumbar strain, and status-post 2012 and authorized January 2, 2018 lumbar fusions. Dr. Nadler opined that the medical evidence of record, in particular Dr. Houston's December 12, 2018 report, did not support a diagnosis of sacroiliitis. Additionally, appellant had no objective evidence of sacroiliitis on examination. Dr. Nadler concluded that appellant did not require sacroiliac arthrodesis or any additional lumbar surgery.

In an August 23, 2019 Form CA-17, Dr. Wilcox found appellant able to work four hours a day within her prior restrictions.[6]

In a September 25, 2019 report, Dr. Wilcox disagreed with Dr. Nadler's opinion, as appellant's significant pain relief following sacroiliac injection was "irrefutable evidence of a

[6] On September 18, 2019 appellant retired from the employing establishment in lieu of a pending disciplinary removal.

sacroiliac source of pain." He found appellant totally disabled from work due to pain and dysfunction caused by her lumbosacral and sacroiliac spinal conditions.

In an October 1, 2019 report, Dr. Jason J.J. Chang, a Board-certified neurosurgeon, reviewed appellant's history of injury and treatment. He diagnosed lumbosacral spondylosis, lumbar pain with left-sided radiculopathy, and lumbar psuedoarthrosis. Dr. Chang opined that appellant's sacroiliac joint and buttock pain was likely transferred pain from the junctional pathology of the T12 through L5 fusion, and degeneration with vacuum disk phenomenon at L5-S1. He recommended an L5-S1 interbody fusion with possible bilateral foraminotomies.

In a November 1, 2019 report, Dr. Wilcox opined that appellant had reached maximum medical improvement.

On November 6, 2019 OWCP requested that Dr. Nadler submit a supplemental report indicating whether the accepted conditions of lower back strain, lumbar radiculopathy, and status-post multilevel fusion continued to be present and disabling. In response, Dr. Nadler submitted a November 7, 2019 report. He opined that the accepted low back strain and lumbar radiculopathy did not disable appellant from full-duty work. Dr. Nadler noted that appellant's post-surgical status warranted permanent work limitations against lifting more than 25 pounds and repetitive bending, but did not limit the number of hours she could work.

By decision dated February 5, 2020, OWCP denied appellant's claim for a recurrence of disability commencing May 2, 2019.

On February 12, 2020 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Following the hearing held on June 9, 2020, OWCP received a July 10, 2020 report by Dr. Wilcox, who noted that appellant underwent a planned second stage L5-S1 fusion on March 12, 2020. Dr. Wilcox related appellant's symptoms of ongoing bilateral sacroiliac pain with bilateral radiculopathy and foot numbness, worse with prolonged standing. He diagnosed thoracic disc disease and a lumbar disc herniation. Dr. Wilcox opined that appellant's persistent radiculopathy following multiple surgeries indicated thoracic stenosis or a breakdown of the spinal fusions.

OWCP received a July 15, 2020 addendum report from Dr. Nadler on the issue of whether the April 20, 2016 employment injury caused or contributed to the development of a sacroiliac condition. Dr. Nadler opined that appellant's response to bilateral sacroiliac injections was insufficient to support the presence of sacroiliitis or sacroiliac joint dysfunction as it was subjective and therefore unreliable. There was no objective evidence of sacroiliac joint tenderness on examination, and no indication for further treatment of a sacroiliac condition. Dr. Nadler noted that he could not "determine what [appellant's] symptoms are related to." He opined that appellant's lower back complaints could be related to unspecified nonorthopedic medical issues.

By decision dated August 5, 2020, the hearing representative affirmed the February 5, 2020 decision.

## ***LEGAL PRECEDENT***

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition that had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[7] This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to the work-related injury or illness is withdrawn, except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force, or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[8]

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a limited-duty position, or the medical evidence of record establishes that he or she can perform the limited-duty position, the employee has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence a recurrence of total disability and to show that he or she cannot perform such limited-duty work.[9] As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the limited-duty job requirements.[10]

An employee who claims a recurrence of disability from an accepted employment injury has the burden of proof to establish that the disability is related to the accepted injury. This burden of proof includes the necessity of furnishing evidence from a qualified physician who concludes, on the basis of a complete and accurate factual and medical history that, for each period of disability claimed, the disabling condition is causally related to the employment injury, and supports that conclusion with medical reasoning.[11] Where no such rationale is present, the medical evidence is of diminished probative value.[12]

## ***ANALYSIS***

The Board finds that this case is not in posture for decision.

OWCP denied appellant's claim for recurrence of disability, based on Dr. Nadler's November 7, 2019 second opinion report that the accepted conditions and post-surgical status did not limit her work hours. Dr. Nadler did not provide medical rationale explaining why appellant's post-surgical status would not limit the number of hours she would be able to work, but required

[7] 20 C.F.R. § 10.5(x); *see J.D.*, Docket No. 18-1533 (issued February 27, 2019).

[8] *Id*.

[9] *R.M.* , Docket No. 20-0486 (issued June 9, 2021); *see D.W.*, Docket No. 19-1584 (issued July 9, 2020); *S.D.*, Docket N. 19-0955 (issued February 3, 2020); *Terry R. Hedman*, 38 ECAB 222 (1986).

[10] *A.H.*, Docket No. 20-1211 (issued April 30, 2011); *J.H.*, Docket No. 19-1476 (issued March 23, 2021); *J.B.*, Docket Nos. 18-1752, 19-0792 (issued May 6, 2019).

[11] *H.T.*, Docket No. 17-0209 (issued February 8, 2019); *Ronald A. Eldridge*, 53 ECAB 218 (2001).

[12] *E.M.*, Docket No. 19-0251 (issued May 16, 2019); *Mary A. Ceglia*, Docket No. 04-0113 (issued July 22, 2004).

other work limitations. The Board has held that a medical opinion not supported by rationale is of diminished probative value.[13]

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden of proof to establish entitlement to compensation. However, OWCP shares responsibility in the development of the evidence to see that justice is done.[14] Once it undertakes development of the record, OWCP must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[15]

As Dr. Nadler failed to provide rationale for his opinion, the Board finds that his opinion is insufficient to carry the weight of the evidence. This case must, therefore, be remanded to refer appellant, the complete medical record, and an updated SOAF to a new second opinion specialist to determine whether the accepted conditions caused a recurrence of disability for the period May 2 through October 25, 2019. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

## ***CONCLUSION***

The Board finds that this case is not in posture for decision.

[13] *M.L.*, Docket No. 20-1682 (issued June 24, 2021); *T.M.*, Docket No. 18-1418 (issued February 7, 2019).

[14] *See J.C.*, Docket No. 20-0064 (issued September 4, 2020); *L.B.*, Docket No. 19-0432 (issued July 23, 2019); *William J. Cantrell*, 34 ECAB 1223 (1983).

[15] *Id.*; *see also S.A.*, Docket No. 18-1024 (issued March 12, 2020).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the August 5, 2020 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 8, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board